

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN A. SCHAFFER and DEPARTMENT OF JUSTICE,
U.S. PENITENTIARY, Lewisburg, PA

*Docket No. 99-255; Submitted on the Record;
Issued August 11, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly adjudicated appellant's claim for an attendant's allowance after April 26, 1994 in lieu of granting his request for a hearing.

On February 22, 1992 appellant, then a 35-year-old correctional officer, filed a claim for injuries sustained as a result of a February 19, 1992 motor vehicle accident. The Office accepted appellant's claim for sciatica and a herniated nucleus pulposus at L5-S1. The Office authorized a February 3, 1994 disc excision.

On December 30, 1997 appellant requested an allowance for an attendant from the date of his injury until the present.

In a decision dated March 27, 1998, the Office denied appellant's claim for an attendant's allowance for the period beginning April 26, 1994 on the grounds that the medical evidence did not establish that he qualified for the services of an attendant due to his February 19, 1992 employment injury.

By letter dated April 1, 1998, received by the Office on April 6, 1998, appellant requested a hearing on his claim before an Office hearing representative.

In a decision dated August 13, 1998 and finalized August 28, 1998, a hearing representative, after review of the case file, affirmed the Office's March 27, 1998 decision. The hearing representative remanded the case, however, for the Office to adjudicate the issue of whether appellant was entitled to an attendant's allowance from the date of his employment injury until April 25, 1994.

The Board finds that the Office did not properly adjudicate appellant's claim for an attendant's allowance after April 26, 1994 in lieu of granting his request for a hearing.

The Federal Employees' Compensation Act, at section 8124, provides that a claimant is entitled to a hearing on a request made within 30 days after the date of issuance of the Office decision and prior to a request for reconsideration under section 8128(a).¹ Further, the Office's implementing regulations provide that a claimant not satisfied with a decision of the Office shall be afforded an opportunity for an oral hearing before an Office hearing representative. A hearing must be requested within 30 days of the date of issuance of the Office's decision and be made to the Office's Branch of Hearings and Review.² The Board has held that the language of section 8124(b) is unequivocal and that a claimant who requests a hearing within 30 days of issuance of a final Office decision is entitled to such hearing as a matter of right.³

In the present case, the Office issued a decision on March 27, 1998 which rejected appellant's claim for an attendant's allowance for the period commencing April 26, 1994. In a letter received by the Office on April 6, 1998, appellant submitted a written request for a hearing on his claim. Office procedures provide that the Branch of Hearings and Review shall make a preliminary review of a case and that when "preliminary study shows that the decision was reached in accordance with established policies and that it is supported by the evidence of record, the case will be scheduled for a hearing."⁴ In the instant case, the hearing representative found that the Office's March 27, 1998 decision was proper and affirmed the decision without according appellant his right to a hearing on the issue adjudicated in the March 27, 1998 Office decision.⁵

As appellant requested a hearing within 30 days of the prior Office decision, he is entitled to the hearing as a matter of right. Consequently, the Office erred in adjudicating the merits of appellant's claim without affording him a hearing on the issue of whether he was entitled to an attendant's allowance after April 26, 1994. The case will therefore be remanded to the Office to provide appellant a hearing under section 8124(b).⁶ Upon return of the case record, the Office should schedule a hearing before an Office hearing representative. After any further development as may be necessary, the Office should issue a *de novo* decision on appellant's claim.

The decisions of the Office of Workers' Compensation Programs dated August 13, 1998 and finalized August 28, 1998 and dated March 27, 1998 are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

¹ 5 U.S.C. § 8124(b).

² 20 C.F.R. § 10.131(a).

³ *John M. Scales*, 42 ECAB 376 (1991).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601(4)(b)(1) (June 1997).

⁵ The hearing representative found that the Office had failed to make proper findings regarding appellant's entitlement to an attendant's allowance for the period of February 19, 1992 to April 25, 1994 and remanded the case for development and adjudication of this period.

⁶ Based on the procedural determination, the issue of whether appellant is entitled to an attendant's allowance for the period commencing April 26, 1994 is premature.

Dated, Washington, D.C.
August 11, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member